

UNITED STATES DISTRICT COURT  
DISTRICT OF PUERTO RICO

DAVID GÓMEZ-OLMEDA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Civil No. 08-1657 (JAF)

(Crim. No. 03-073)

**ORDER**

Petitioner David Gómez-Olmeda moves for habeas corpus relief from a federal court conviction pursuant to 28 U.S.C. § 2255. Docket No. 1. Respondent the United States of America responds. Docket No. 3.

On November 12, 2003, Petitioner, David Gómez-Olmeda, pled guilty to violations of 18 U.S.C. §§ 2114, 2112, 924(j), 844, 1361, and 922(g)(1), for his involvement in a homicide committed against an FBI informant. Case No. 03-073, Docket No. 156. On September 10, 2004, Petitioner filed a pro-se motion to withdraw his guilty plea. Case No. 03-073, Docket No. 245. On September 23, 2004, through counsel, Petitioner withdrew his motion and we sentenced Petitioner to life imprisonment. Case No. 03-073, Docket No. 247. On September 27, 2004, Petitioner appealed his conviction to the United States Court of Appeals for the First Circuit. Case No. 03-073, Docket No. 248.

On November 8, 2004, Petitioner filed a motion for this court to correct his sentence pursuant to 28 U.S.C. § 2255, claiming that he received ineffective assistance of counsel. Case No. 03-073, Docket No. 259; Case No. 04-2229, Docket No. 1. We denied that motion on

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1 the merits on June 3, 2005, while Petitioner's appeal was still  
2 pending before the First Circuit. Case No. 04-2229, Docket No. 3.  
3 Petitioner did not appeal our denial of his habeas petition.

4 On September 8, 2008, the First Circuit denied Petitioner's  
5 appeal. United States v. Forteza-García, 2006 WL 4399664 (1st Cir.  
6 Sept. 8, 2006). The First Circuit noted that we had erred in  
7 addressing the merits of Petitioner's § 2255 petition while the direct  
8 appeal was pending. Id. at \*3. The First Circuit stated that it had  
9 no jurisdiction to correct our judgment in Petitioner's first habeas  
10 case because Petitioner had not appealed, and refrained from deciding  
11 whether a subsequent § 2255 petition should be treated as a "second  
12 or successive" motion. Id. However, the First Circuit informed  
13 Petitioner that if he believed a new motion should not be treated as  
14 "second or successive," he should file his § 2255 petition in the  
15 district court and argue why it should not be so treated. Id.

16 On June 17, 2008, Petitioner filed the present § 2255 petition  
17 in Federal District Court. Docket No. 1.

18 We have jurisdiction to entertain a § 2255 motion when the  
19 petitioner is in custody under the sentence of a federal court. See  
20 28 U.S.C. § 2255. Section 2255 provides four grounds under which a  
21 federal prisoner challenging the imposition or length of his sentence  
22 may seek relief. The petitioner may argue that: (1) the court imposed  
23 the sentence in violation of the Constitution or laws of the United  
24 States; (2) the court was without jurisdiction to impose such a  
25 sentence; (3) the sentence was in excess of the maximum time  
26 authorized by law; or (4) the sentence is otherwise subject to  
27 collateral attack. See id. Should a court find any of these errors,  
28 it "shall vacate and set the judgment aside and shall discharge the

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1 prisoner or resentence him or grant a new trial or correct the  
2 sentence as may appear appropriate." Id.

3 The court may only entertain a second or successive § 2255  
4 petition if it contains newly-discovered evidence that establishes the  
5 petitioner's innocence by clear and convincing evidence or if it  
6 relies upon a new rule of constitutional law that applies  
7 retroactively. § 2255(h).

8 Petitioner argues that his sentence was unconstitutional because  
9 his counsel was ineffective. Docket No. 1. His petition is identical  
10 to the petition we rejected on the merits in 2005. Compare Docket  
11 No. 1 with Case No. 04-2229, Docket No. 1. While we recognize that  
12 we erred by deciding Petitioner's first petition prior to the  
13 conclusion of his direct appeal, Petitioner has offered no reason why  
14 our previous merits determination was tainted by this error. Docket  
15 No. 1. Nor has he argued, as instructed by the First Circuit, that  
16 his motion should not be treated as a second or successive motion  
17 under the federal habeas statute. See Forteza-Garcia, 2006 WL 4399664  
18 at \*3; Docket No. 1. Accordingly, we reject Petitioner's motion as  
19 a second or successive motion for which no justification exists. See  
20 § 2255(h).

21 Therefore, we **DENY** Petitioner's § 2255 motion, Docket No. 1, **WITH**  
22 **PREJUDICE**. Pursuant to Rule 4(b) of the Rules Governing § 2255  
23 Proceedings, summary dismissal is in order because it plainly appears  
24 from the record that Petitioner is not entitled to § 2255 relief in  
25 this court.

26 **IT IS SO ORDERED.**

27 San Juan, Puerto Rico, this 31<sup>st</sup> day of October, 2008.

28 S/José Antonio Fusté  
29 JOSE ANTONIO FUSTE

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Chief U.S. District Judge